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BEFORE THE
U.S. DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

In the Matter of		
Computer Reservation Systems (CRS) Regulations; Statements of General Policy	**Dockets**	**OST-97-2881** - 330 **OST-97-3014** - 96 **OST-98-4775** - 141 **OST-99-5888** - 34
Notice of Proposed Rulemaking		

ANSWER OF AMERICA WEST AIRLINES, INC.,
OPPOSING PETITION OF SABRE, INC., FOR FACT HEARING

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January 13, 2003

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ANSWER OF AMERICA WEST AIRLINES, INC.,
OPPOSING PETITION OF SABRE, INC., FOR FACT HEARING

America West Airlines, Inc. ("America West") respectfully submits this answer opposing the petition of Sabre, Inc. ("Sabre") requesting the Department of Transportation ("Department") to hold a fact hearing on the Notice of Proposed Rulemaking ("NPRM") regarding Computer Reservation System ("CRS") regulations, 14 C.F.R. Part 255 (the "CRS Rules"). 67 Fed. Reg. 69366 (Nov. 15, 2002). As expressed in its answer in support of extending the deadline for filing comments in this proceeding,[1] America West has long supported changes in the CRS Rules to

[1] *See Answer of America West Airlines, Inc. In Support of Petition For Extension of Deadlines For Submission Of Comments and For Extension of CRS Rules Sunset Date* (filed December 3, 2002).

reduce or eliminate the anticompetitive impact of CRS market power and promote the ability of airlines and travel agencies to develop alternatives to CRSs.

America West always has supported the expeditious resolution of CRS issues and the issuance new regulations, while ensuring all parties receive a full and fair opportunity to participate and the Department is fully informed regarding the issues under consideration. Sabre proposes to mire this proceeding in a drawn out and unnecessary fact hearing for the alleged purpose of allowing "the Department [to] discover whether the fact-based economic assumptions on which its proposed rule rests are valid and whether, as a consequence, the regulations should be adopted, modified or abandoned." Petition at 2. Sabre, however, fails to explain why notice and comment procedures cannot achieve precisely the same end. The Department has requested information and comment on every facet of the proposed rules included whether they are needed at all and whether they should apply to systems like Sabre, which are not airline owned. Nothing precludes Sabre (or any other interested party) from submitting any and all information relevant to the issues and making its strongest case in support of its view. In short, a fact hearing is not necessary to protect the rights of Sabre or to ensure the Department's ultimate conclusions are based on "substantial evidence."[2] All the proposed fact hearing would accomplish in this context is to waste resources of interested parties including CRSs, airlines, and consumer groups, and the Department at a time when the airline industry can scarcely afford it.

At the very least, it is premature to consider expending considerable resources on a fact hearing. If after the opportunity for comment has ended, an interested party believes and oral argument is necessary to address specific issues, it can then submit a petition seeking such a

[2] America West does not take a position on the standard of review applicable to any final rule the Department may promulgate.

hearing. At that point, a party would be in a position to rely on the actual record before the agency rather Sabre's purely speculative predictions the traditional notice and comment procedure is doomed to failure.

In addition, Sabre's contention that a fact hearing is necessary to "avoid serious procedural errors" and, ultimately, invalidation of any final rule, is without merit. Sabre's underlying theory appears to be that any proposed rule must withstand scrutiny under a "substantial evidence" standard of review[3] or parties are somehow deprived of their ability to comment meaningfully on the issues presented, i.e., the Department must resolve issues before it may initiate a proceeding to resolve issues.. Not surprisingly, none of the cases cited by Sabre support this theory.[4] Rather, as *Connecticut Light & Power Co. v. NRC*, 673 F.2d 525, 530 (D.C. Cir. 1982), cited by Sabre, establishes, a notice of proposed rulemaking need not be supported by substantial evidence, but only "provide an accurate picture of the reasoning that has led the agency to the proposed rule" so that "interested parties will . . . be able to comment meaningfully upon the agency's proposals." Indeed, in reviewing the final rules at issue in *Connecticut Power & Light*, the court noted "an agency adopting rules by notice and comment rule-making must

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[3] *See* Petition at 2 ("the NPRM is not based on 'substantial evidence,' and cannot be sustained under the Administrative Procedure Act ('APA')"; Petition at 12 ("A review of the NPRM and the public record shows that neither the evidence in the record nor that referenced in the NPRM satisfies this ['substantial evidence'] standard").

[4] *FCC v. National Citizens Comm. For Broadcasting*, 436 U.S. 775, 803 (1977) (final rules promulgated pursuant to informal rulemaking procedures not subject to "substantial evidence" but "arbitrary and capricious" standard of review); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 41 (1983) (rescission or modification of rule subject to same "arbitrary and capricious" standard as rules promulgated pursuant to informal rulemaking procedures); *Association of Data Processing Serv. Orgs. V. Board of Governors of the Fed. Res. Sys.*, 745 F.2d 677, 686 (D.C. Cir. 1984) ("arbitrary and capricious"/"substantial evidence" standard applied in review of final rule); *Bangor Hydro-Elec. v. FERC*, 78 F.3d 659, 663 (D.C. Cir. 1996) ("arbitrary and capricious" standard applied to review FERC order); *Consolidate Edison, Co. v. NLRB*, 305 U.S. 197, 229 (1938) (pre-APA case in which order of NLRB reviewed under "substantial evidence" standard); *Illinois Central R.R. Co. v. Norfolk & Western Ry. Co.*, 385 U.S. 57, 66 (1966) (applying "substantial evidence" standard in review of Interstate Commerce Commission order).

provide a concise general statement of [the rules'] basis and purpose." *Id.* At 534. In short, there is simply nothing to Sabre's contention that the NPRM must be based on "substantial evidence."

In any event, the NPRM certainly provides a full description of the Department's reasoning for its tentative conclusions and proposals.[5] Sabre's ability to state in great detail what it considers to be erroneous in the Department's reasoning demonstrates that the Department adequately explains the basis of the NPRM. Moreover, even a brief review of the NPRM shows it contains numerous references to recent studies and other information submitted by interested parties, which the Department asserts support its tentative conclusions. For example, Sabre contends:

> There is no evidence that CRSs charge supracompetitive booking fees to airlines, that booking fees are immune to market pressures, that the cost of those booking fees outweighs the benefits that the CRSs provide, or that booking fee increases cause airlines to materially increase ticket prices consumers pay.

Petition at 12. However, a number of airlines have submitted information related to this issue. As recently as June 2001, America West placed detailed information in the record related to its concern that CRSs continue to charge excessive, supracompetitive booking fees based on the exercise of market power over airlines.[6]

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[5] America West does not necessarily agree with all of the Department's factual or policy conclusions. America West will likely submit further information and analyses challenging certain provisions of the proposed rule. The notice and comment procedure used in this proceeding is more than adequate to allow interested parties to present information and analyses and to advocate their respective points of view.

[6] *See Supplemental Reply Comments of America West, Inc.* (filed June 13, 2001). These comments updated information submitted by America West in October 2000. *See Reply Comments of America West, Inc.*(filed October 23, 2000 in Docket Nos. OST-97-2881, OST-97-3014, OST-98-4775).

Sabre cites no case in which a NPRM was deemed inadequate because it did not contain sufficient factual information supporting an agency's preliminary conclusions. In fact, the court in *Connecticut Power & Light* concluded the NPRM at issue was sufficient, noting:

> During the comment period, the utilities repeatedly asked the NRC to identify the technical studies upon which the proposed rules were based. The NRC was unhelpful and the comments submitted are noticeably general. Certainly, it would have been better practice for the NRC to have identified these technical materials specifically in the notice of proposed rule-making. Nonetheless, this rule-making process took place against the background of five years during which the Commission explored safety proposals in a public forum and exposed the important, technical studies to adversarial comment. Given this context, we conclude the technical background of the rules was sufficiently identified to allow for meaningful comment during the rule-making process.

673 F.2d at 532 (footnotes omitted). Thus, even if, as Sabre alleges, the Department were withholding studies upon which it relied in issuing the NPRM, the issues surrounding the influence of CRSs on airline distribution have been the subject of intense debate among interested parties in a public forum, often spurred by Department or other governmental studies, precludes any claim the record does not adequately support the NPRM or provide interested parties with an effective basis for comment.

America West is also concerned that Sabre is seeking special, costly consideration and procedures regarding issues on grounds it and another non-airline-held CRS, Galileo, are "exceptionally affected" by "party-specific adjudicative facts" to be ascertained in this proceeding. Petition at 2, 18. To grant the Petition on this basis would be to effectively invite the Balkanization of this proceeding into a myriad of protracted, resource-depleting "mini-trials" on issues of particular concern to particular parties. Again, Sabre is unable to muster any legal authority for its position, relying on precedent that actually supports the contrary position. In

United Air Lines, Inc. v. CAB, 766 F.2d 1107 (7th Cir. 1985) United argued precisely what Sabre argues here: an adjudicatory hearing including the use of cross-examination is necessary to establish whether CRS owners exercise market power before an agency may issue rules governing CRSs. After a thorough review of legal authority supporting an agency's right to establish complex, economically-based facts using notice and comment rulemaking procedures, the Seventh Circuit stated:

> More than authority is against United . . . The biggest practical difference between adjudicative and rule-making procedure is that cross-examination is available in the former but not . . . the latter. *But cross-examination is perhaps not a terribly useful tool for extracting the truth about what are at bottom complex economic phenomena.* Antitrust trials, whether judicial or administrative, have long been criticized for their *inordinate length, cost and complexity*.

766 at 1121 (emphasis added; citation omitted). The court went on to express doubt that adjudicatory-type fact hearings on such issues "elucidate[s] more than it confuses the issues" and whether an agency "would really have come up with substantively sounder rules if it had given United Air Lines all the procedural rope that United sought." *Id.* Moreover, the court expressed its belief that an agency "engaged full-time in the regulation of the airline industry could rationally persuade it that it could dispense with procedural safeguards designed primarily to guide the lay judges we call jurors and the generalist judges who decide bench trials." *Id.*[7]

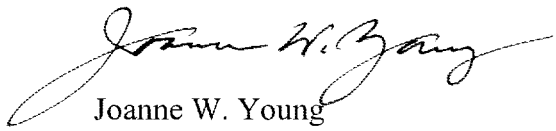
In short, a fact hearing proposed by Sabre will not only waste scarce resources at a time when airlines and other interested parties can scarcely afford it, overwhelming legal authority –

[7] Sabre's reliance on *Natural Res. Defense Council v. Herrington*, 768 F.2d 1355 (1985), is unavailing. That case involved the Department of Energy's obligation to allow cross-examination of agency employees pursuant to a statutory provision specifically requiring the procedure. No such provision requires the Department to allow cross-examination.

cited by Sabre itself – establishes the Department need not conduct such a hearing to preserve the validity either of the NPRM or ensure the validity of any final rule it promulgates. If Sabre disagrees with the preliminary factual or policy conclusions set forth in the NPRM should submit information and comments to the Department in an effort to convince it to promulgate a final rule adopting Sabre's positions.

For the foregoing reasons, America West respectfully requests the Department deny Sabre's Petition for a fact hearing.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of January, 2003, a copy of the foregoing Answer of America West Airlines, Inc., Opposing Petition of Sabre, Inc., for Fact Hearing was served by first class mail, postage prepaid, on the following:

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